Statutes

Section 750 Judiciary Law of the State of New York provides:

POWER OF COURTS TO PUNISH FOR CRIMINAL CONTEMPTS

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the Judiciary Law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein, or subjection of an employee to discharge or pen-

> alty on account of his absence from employment by reason of jury service in violation of this chapter. Applications to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the Supreme Court at which contested motions are heard, or of the county court if the Supreme Court is not in session."

Section 619-c of the New York State Code of Criminal Procedure provides for the granting of immunity as follows:

> ". . . 2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt."

Statement of the Facts

The petitioner Rastelli had been subpoenaed before a Kings County Grand Jury, the last of which such appearances was on February 5, 1970. He was asked certain questions and he asserted his Fifth Amendment privilege.

Thereupon in the manner prescribed by law, the petitioner was granted full and complete statutory immunity pursuant to statute. Despite said grant of statutory immunity, the petitioner persisted in his refusal to answer any and all questions. As a result thereof he was served with an order to shown cause to punish him for contempt. The petitioner appeared before Mr. Justice Helfand and was held in contempt on April 30, 1970, after refusing in open court to return to the Grand Jury and answer proper and lawful interrogatories propounded to him. The petitioner was sentenced to 30 days in the Civil Jail and to pay a fine of $250.

The said order was affirmed by the Appellate Division, Second Department, on June 15, 1970.

The Court of Appeals of the State of New York denied leave to appeal to that Court on July 6, 1970. The said Court also denied a stay of proceedings pending an application for certiorari to this Court.

The petitioner was indicted for criminal contempt. He was charged with violation of Section 215.50, subdivision 4 of the Penal Law of the State of New York on June 11, 1970.

An application for a further stay of the commitment order was made to the Hon. John M. Harlan, an Associate Justice of this Court, on July 29, 1970. A stay was granted pending the filing of papers by the petitioner by August 26, 1970.

ARGUMENT

POINT I.

It was not a violation of due process of law and petitioner's Fifth Amendment privilege to punish him for contempt in refusing to answer before a Kings County Grand Jury some of the same questions which he had already refused to answer before a Nassau County Grand Jury and for which he had already been punished by a jail sentence by reason of such refusal.

The petitioner contends that the investigations in Kings County and Nassau County are basically the same investigation. This contention is not correct. The investigation in Nassau County deals with the disappearance of Frank Mari and Michael Adamo. The investigation in Kings County by the Grand Jury is into the takeover of a Crime Syndicate in the County of Kings formerly headed by Joseph Bonanno and multiple homicides and assaults in the County of Kings that led to the takeover of this Crime Syndicate. Frank Mari based upon information supplied to the District Attorney of Kings County was a leading contender to succeed Joseph Bonanno. As one can see the investigations are not one and the same, but overlap in one small area. It is the duty of the District Attorney of Kings County and the Grand Jury to determine who the perpetrators of these murders and assaults in Kings County are, and it is believed that the petitioner could further aid the Grand Jury investigation. Through information supplied to the Kings County District Attorney by reliable police sources Rastelli's name was given to us along with certain information stating that the petitioner may be able to furnish testimony concerning the perpetrators of these crimes in the County of Kings.

It is quite possible that the Kings County investigation may overlap to some extent the Nassau County investigation; however, both investigations basically deal with a different subject matter and the Kings County investigation is much broader in scope and does not deal only with the disappearance of two men as the Nassau County investigation does.

Mr. Rastelli's rights have been protected by his counsel and the District Attorney of Kings County. The District Attorney of Kings County is conducting its own independent investigation in good faith. The bona fide nature of the Kings County investigation has already been ruled upon by the courts and affirmed by the Appellate Courts in other contempt cases—*Menna* v. *Gold*, 25 N Y 2d 475 (1969).

The case of *Matter of Koota* v. *Colombo*, 17 N Y 2d 147, allows the District Attorney to indict the witness for contempt under the Penal Law of New York, and/or initiate proceedings under the Judiciary Law of New York to hold the witness in contempt. This case allows the District Attorney to use both methods if he so desires. See also *Matter of Ushkowitz* v. *Helfand*, 15 N Y 2d 713. The petitioner claims that his rights under the Fifth Amendment of the United States Constitution are being violated since he was indicted under the Penal Law of the State of New York Section 215.50, subdivision 4, and adjudicated in contempt under the Judiciary Law of the State of New York, Section 750. This is not so. The petitioner was indicted for not answering questions under Section 215.50 of the Penal Law of the State of New York, and the petitioner was held in contempt under Section 750 of the Judiciary Law of the State of New York for disobeying the lawful mandate of Justice Helfand who ordered him back to the Grand Jury to answer the questions propounded to him. The petitioner

has committed two separate acts, one is refusing to obey the lawful mandate of the Court so Mr. Justice Helfand held him in contempt under the Judiciary Law of the State of New York. The second act was the petitioner's refusal to answer questions before a Grand Jury. The petitioner was indicted for refusing to answer the questions propounded to him. Since the petitioner has committed two separate acts he is not placed in a position of twice being in jeopardy for the same crime. His refusal to obey the Courts direction and his refusal to answer questions are independent acts of each other and do not give rise to double jeopardy. The petitioner has not indicated that he wishes to purge himself; therefore, he has no standing to raise the issue that he would in effect be pleading guilty to an indictment. At present there is no issue to be litigated since the petitioner is not in a position to possibly do harm to himself legally.

The immunity statute in New York Section 619-c of the Code of Criminal Procedure is more than co-extensive with the petitioner's privilege against self-incrimination. This petitioner receives transactional immunity—*Menna* v. *Gold*, 25 N Y 2d 475 (1969).

POINT II

It was not a deprivation of petitioner's constitutional right to the assistance of counsel to refuse petitioner's request to have his counsel physically present with him in the Grand Jury room during his interrogation by the Grand Jury.

The law always has been that a witness before a Grand Jury or other similar investigative body, does not have the right to have an attorney actually in the room, *Anonymous* v. *Baker*, 360 U.S. 287, 292 (1959); *Matter of Groban*, 352 U.S. 330, 333 (1957); *United States* v. *Scully*, 225 F. 2d 113, 115-116 (2nd Cir. 1955) cert. den. 350 U.S. 897; *Matter of Black*, 47 F. 2d 542, 543 (2nd Cir. 1931); *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir. 1965); *People* v. *Ianniello*, 21 N Y 2d 418, 423, although the right to consult with his attorney who may be outside the chamber is really not in serious dispute. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964); *United States* v. *Leighton*, 265 F. Supp. 27, 38 (S.D.N.Y. 1967); *United States* v. *Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965); *United States* v. *Grunewald*, 164 F. Supp. 640 (S.D. N.Y. 1958); *People* v. *Ianniello*, 21 N.Y 2d 418, 423; *People* v. *DeFeo*, 284 App. Div. 622, 627, rev'd on other grounds, 308 N.Y. 595 (1954).

Even Mr. Justice Black who dissented in *In re Groban*, *supra*, in an opinion joined in by Chief Justice Warren and Justices Douglas and Brennan, indicated that he would have joined the majority had the case involved the traditional 12 to 23 member Grand Jury, where there was less danger of abuse than in the situation actually before the Court, one of a single inquisitor.

Mr. Justice Black said that the need for counsel in the room was not as great where grand jurors were concerned:

> "They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly, the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them."

In re Groban, supra at 347.

It would seem that the wisdom of these rules is still valid because if counsel were permitted in the Grand Jury room itself, constant objections to questions on the ground of relevancy, form or other privilege and constant requests for rulings from the Court sitting would unduly lengthen the Grand Jury's proceedings. There could be a serious roadblock to legitimate inquiry implanted by stalling or delaying tactics and since a Grand Jury never ultimately determines innocence or guilt and the sufficiency of its indictments are usually open to judicial scrutiny anyway, no harm is inherent in adhering to the prevailing rules.

The secrecy of the Grand Jury's proceedings could be seriously impaired because oftentimes the same attorney represents more than one witness during a particular in-

vestigation. The proceedings would essentially be changed in character from proceedings basically investigatory in nature to an adversary situation. This would pervert the historical purpose of the Grand Jury as a finder of fact and turn its proceedings into a pre-trial hearing. That sentiment was expressed in *Stallings* v. *State*, 154 Conn. 272 (1966), where it was thought that allowing counsel into the room would turn the Grand Jury's proceedings into nothing more than a preliminary trial and the dangers were forcefully and clearly noted by Chief Judge Fee in *United States* v. *Smythe*, 104 F. Supp. 283, 290-291 (N.D. Cal. 1952) and by District Judge Kirkpatrick in *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933).

Petitioner argues that the rationale of recent decisions of this Court in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *Miranda* v. *Arizona*, supra; *United States* v. *Wade*, 388 U.S. 218 (1967) and *Coleman* v. *Alabama*, U.S. , 38 U.S.L.W. 4534 (Decided June 22, 1970) required the extension of the right to counsel to the Grand Jury Room.

Analysis of those authorities reveals that their holdings do not affect the long standing practice of excluding the attorney from the room itself. All of the Courts that have considered the problem have concluded that because the Grand Jury does not involve a situation where oppressive custodial interrogation in a police dominated atmosphere is present, the right to counsel should not be further extended to that situation. *United States* v. *DiMichele*, 375 F. 2d 959 (3rd Cir. 1967); *United States* v. *Goldenberg*, 276 F. Supp. 898, 900 (S.D.N.Y. 1967); *United States* v. *Wolfson*, 282 F. Supp. 772 (S.D.N.Y. 1967); *State* v. *Nelson*, 202 So. 2d 232 (Fla. 1968).

Judge Tenney pointed out in *United States* v. *Goldenberg*, *supra* at 909 that:

> "Neither *Escobedo* or *Miranda* is authority for the proposition that a witness before a Grand Jury is entitled to have counsel physically present with him in the Grand Jury room".

This Court also recognized in *Miranda* itself that the factors present in the police station were different than would attend other types of less overbearing inquiry.

> "As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other *official investigations*, where there are impartial observers to guard against intimidation or trickery". (Emphasis added) *Miranda* v. *Arizona*, *supra* at 461.

Contrary to the Alabama preliminary hearing in the *Coleman* case, Grand Jury proceedings are not a "critical Stage" of the prosecution because potential substantial prejudice to a defendant's rights does not exist. Grand Jury proceedings are not a confrontation, *Costello* v. *United States*, 350 U.S. 463 (1956); *United States* v. *Smythe*, *supra*, and since they only determine whether a man should be made to answer criminal charges, the prosecutor's case against him does not in any way benefit from what occurs in the Grand Jury. The proceeding only examines evidence already secured and does not result in the addition of anything new or the waiver or relinquishment of any rights or course of action otherwise available to a witness or defendant.

This Court has held that even if error of constitutional magnitude is present, if no harm results, the error can be disregarded. *Chapman* v. *California*, 386 U.S. 18 (1967).

In a recent case, *Coleman v. Alabama*, U.S. , 38 U.S.L.W. 4535 (decided June 22, 1970), where the petitioner had been deprived of his right to counsel at a preliminary hearing, this Court decided that although it was a critical stage of the proceedings, still, a remand was appropriate to determine if there had been any prejudice. The law of Alabama prevented the use of anything said at the hearing without counsel and if no harm was apparent, the judgment would not have to be disturbed. *Chapman* was reaffirmed.

CONCLUSION

The petition for the writ of Certiorari should be denied.

Dated: Brooklyn, New York
October 23, 1970.

Respectfully submitted,

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